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Public Prosecutor v Jafperi bin Noor & Anor

B HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO WA-45SOM-4–11 OF 2021
NOORIN BADARUDDIN J
24 APRIL 2024

C *Criminal Law — Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('ATIPSOM') — Section 26A ATIPSOM — Section 2 ATIPSOM — Prima facie case — Prosecution's failure to adduce evidence — Whether prima facie case for offence of smuggling migrants proven against accused persons — Whether migrants were smuggled migrants — Whether accused persons in furtherance of their common intention had assisted in smuggling of migrants out of Malaysia — Evidence Act 1950 s 114(g) — Penal Code s 34*

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E The first accused and the second accused were charged with the offence of smuggling migrants under s 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the ATIPSOM'). In proving its case, the prosecution relied on the evidence by, inter alia, the investigating officer ('PW17') and the seven migrants named in the charge. The prosecution's case was that both the accused persons in furtherance of their common intention had given shelter to the seven migrants for the purpose of their illegal exit from Malaysia via the Kuala Lumpur International Airport 2, Sepang ('KLIA2'). Previously, the seven migrants had committed the offence of staying without valid documentation and had overstayed in Malaysia. The prosecution stated that the seven migrants had obtained assistance from both the accused persons to arrange for their illegal exit from Malaysia. Specifically, the prosecution contended that the first accused had provided the migrants with a temporary accommodation in Putrajaya, obtaining the special pass chop for the migrants' passports, obtaining the Covid-19 screening letters and purchasing the flight tickets for the migrants. As for the second accused, the prosecution argued that the second accused was responsible for 'setting up' the immigration counter at KLIA2. The question that arose was whether the seven migrants were smuggled migrants when at the time they were in the process of exiting Malaysia, the Malaysian government had initiated a programme known as 'Program Rekalibrasi Pulang' ('the programme').

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Held, discharging and acquitting the accused persons without them having to enter their defence:

(1) At the close of the prosecution's case, the court ought to undertake a maximum evaluation of evidence adduced by the prosecution to

determine if the prosecution had proven a prima facie case against the accused. If a reasonable doubt was created, it would mean that the prosecution had failed to prove a prima facie case. Section 26A of the ATIPSOM stated that any person who carries out smuggling of migrants commits an offence. A smuggled immigrant was defined in s 2 of the ATIPSOM as a person who is the object of the act of smuggling of migrants, regardless of whether that person participated in the act of smuggling of migrants. To establish the charge against the accused persons, it was thus incumbent on the prosecution to prove: (a) that the seven migrants were smuggled migrants; and (b) that the accused persons in furtherance of their common intention had assisted in the smuggling of the seven migrants out of Malaysia (see paras 16–17 & 19–20).

(2) The court found that the investigation conducted by PW17 was not objective in nature and was one-sided and the evidence which was favourable to the first accused was somehow 'ignored'. No evidence was adduced to show that the seven migrants were not entitled to the protection or exception under the programme. PW17 admitted that she did not have knowledge whether the seven migrants were registered under the programme. The documents relating to the programme found in the seven migrants' handphone was never extracted during the investigation. The omission by PW17 had compromised the defence's case and that had created doubts in the prosecution's case. There were gaps that existed in the unfolding of the prosecution's case in its entirety. The doubts which existed and not negated by the prosecution called for the invocation of s 114(g) of the Evidence Act 1950 in that evidence which could be and was not produced would if produced be unfavourable to the prosecution. With the evidence from PW17 as stated in the above and the WhatsApp conversations of the seven migrants coupled with the letter relating to the programme forwarded by the first accused to the migrants, reasonable inference tilted in favour of the first accused in that he could not be gainsaid to be smuggling by assisting or facilitating the seven migrants' exit from Malaysia illegally under s 2 of the ATIPSOM (see paras 29–30 & 41–42).

(3) In view of the fact that there were special pass chops on the passports of the second to sixth migrants and documentary evidence to show that they had the STOs (Sistem Temujanji Online) under the programme and applying the case of *Mohammad Jafor Hossain v Public Prosecutor* [2016] MLJU 1919, the court found that the seven migrants could not be gainsaid to be smuggled migrants in their effort to return to their homeland as they came under the exception of the programme. PW17 agreed that she knew of the programme through the documents seized during the raid and yet no further investigation was done to rebut the defence raised herein. The failure on the part of the prosecution to rebut

A the evidence adduced in favour of the seven migrants relating to the programme was therefore fatal (see para 37).

(4) The court found that there was no evidence adduced before the court to show the involvement of the second accused. Firstly, PW17 affirmed B that none of the seven migrants knew or mentioned the name of the second accused or her involvement in the present case, in their depositions. Secondly, nowhere in the evidence that showed the second accused had prepared forged special pass chops or the Covid-19 letter for the seven migrants. PW17 affirmed this fact too. Thirdly, the second C accused was never involved or mentioned in any of the WhatsApp conversations between the seven migrants and the first accused. Fourthly, no documents belonging to any of the seven migrants were found with the second accused. Fifthly, the second accused did not provide any shelter to the seven migrants and neither did she provided D transportation to KLIA2 for the seven migrants. Lastly, no evidence was adduced to show that the second accused had in fact made arrangement for 'setting up' the counter at the KLIA2. The court found that the prosecution had failed to prove that the second accused and the first accused had in any way communicated or planned or arranged or E facilitated the exit of the seven migrants illegally. Therefore, the second accused could not be said to have known or had reason to believe that the seven migrants' exit was illegal or unlawful (see paras 43–45 & 47).

(5) It was well-settled principle that common intention within the meaning F of s 34 of the Penal Code implied pre-arranged plan and the criminal act was done in pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence. However, the critical circumstance was that the said plan must preceded the act constituting the offence. Based on the analysis elaborated in the G above, the court found that the prosecution had failed to prove common intention of both accused persons in the alleged act of smuggling the seven migrants (see para 48).

(6) The court found that there were gaps that existed in the unfolding of the prosecution's case in its entirety. Reasonable doubts which existed were H not negated by the prosecution. The requirements of strict proof in a criminal case could not be relaxed to bridge any material gap in the prosecution evidence. Premised on the evidence adduced, the court was not convinced of the guilt of both accused persons. They were entitled to an acquittal as there were material gaps which raised reasonable doubts I as to their guilt. As the onus of proving the guilt of both the accused persons lay throughout on the prosecution, the court found that the whole evidence left the court in real state of doubt and as such the prosecution had failed to satisfy the onus of proof which lay upon them (see para 49).

[Bahasa Malaysia summary

Tertuduh pertama dan tertuduh kedua dipertuduh atas kesalahan menyeludup migran di bawah s 26A Akta Antipemerdagangan Orang dan Antipenyeludupan Migran 2007 ('ATIPSOM'). Dalam membuktikan kesnya, pihak pendakwaan bergantung kepada keterangan oleh, antara lain, pegawai penyiasat ('PW17') dan tujuh migran yang dinamakan dalam pertuduhan. Kes pendakwaan ialah kedua-dua tertuduh dalam meneruskan niat bersama mereka telah memberi perlindungan kepada tujuh migran bagi tujuan untuk mengeluarkan mereka secara haram dari Malaysia melalui Lapangan Terbang Antarabangsa Kuala Lumpur 2, Sepang ('KLIA2'). Sebelum ini, tujuh migran tersebut telah melakukan kesalahan tinggal tanpa dokumen yang sah dan tinggal lebih masa di Malaysia. Pihak pendakwaan menyatakan bahawa ketujuh-tujuh migran tersebut telah mendapatkan bantuan daripada kedua-dua tertuduh untuk mengatur pengeluaran haram mereka dari Malaysia. Secara khususnya, pihak pendakwaan berhujah bahawa tertuduh pertama telah menyediakan tempat tinggal sementara kepada migran-migran tersebut di Putrajaya, mendapatkan cap pas khas untuk pasport migran-migran tersebut, mendapatkan surat saringan Covid-19 dan membeli tiket penerbangan untuk mereka. Bagi tertuduh kedua pula, pihak pendakwaan berhujah bahawa tertuduh kedua bertanggungjawab 'mendirikan' kaunter imigresen di KLIA2. Persoalan yang timbul ialah sama ada ketujuh-tujuh migran tersebut adalah migran yang diseludup sedangkan ketika mereka dalam proses keluar dari Malaysia, kerajaan Malaysia telah memulakan program yang dikenali sebagai 'Program Rekalibrasi Pulang' ('program tersebut').

Diputuskan, melepaskan dan membebaskan tertuduh-tertuduh tanpa mereka perlu membela diri:

(1) Pada penutupan kes pendakwaan, mahkamah hendaklah menjalankan penilaian maksimum terhadap keterangan yang dikemukakan oleh pihak pendakwaan untuk menentukan sama ada pihak pendakwaan telah membuktikan kes prima facie terhadap tertuduh. Jika keraguan munasabah diwujudkan, ini bermakna pihak pendakwaan gagal membuktikan kes prima facie. Seksyen 26A ATIPSOM menyatakan bahawa mana-mana orang yang menjalankan penyeludupan migran melakukan suatu kesalahan. Migran yang diseludup ditakrifkan dalam s 2 ATIPSOM sebagai seseorang yang menjadi objek perbuatan penyeludupan migran, tidak kira sama ada orang itu turut serta dalam perbuatan penyeludupan migran itu. Untuk membuktikan pertuduhan terhadap orang-orang yang dituduh, adalah menjadi tanggungjawab pihak pendakwaan untuk membuktikan: (a) bahawa tujuh migran tersebut adalah migran yang diseludup; dan (b) bahawa orang-orang yang dituduh dalam meneruskan niat bersama mereka telah membantu dalam penyeludupan tujuh migran tersebut keluar dari Malaysia (lihat perenggan 16–17 & 19–20).

(2) Mahkamah mendapati siasatan yang dijalankan oleh PW17 tidak bersifat objektif dan berat sebelah dan keterangan yang memihak kepada tertuduh pertama entah bagaimana 'diabaikan'. Tiada keterangan dikemukakan untuk menunjukkan bahawa tujuh migran tersebut tidak berhak mendapat perlindungan atau pengecualian di bawah program tersebut. PW17 mengakui tidak mengetahui sama ada tujuh migran tersebut didaftarkan di bawah program tersebut. Dokumen-dokumen yang berkaitan dengan program tersebut yang ditemui dalam telefon bimbit tujuh migran tersebut tidak pernah dikeluarkan semasa siasatan. Peninggalan PW17 telah menjejaskan kes pembelaan dan ia telah menimbulkan keraguan dalam kes pendakwaan. Terdapat jurang yang wujud dalam pembentangan kes pendakwaan secara keseluruhannya. Keraguan yang wujud dan tidak dinafikan oleh pihak pendakwaan memerlukan penggunaan s 114(g) Akta Keterangan 1950 di mana keterangan yang boleh dan tidak dikemukakan akan jika dikemukakan tidak memihak kepada pihak pendakwaan. Dengan keterangan daripada PW17 seperti yang dinyatakan di atas dan perbualan WhatsApp tujuh migran tersebut ditambah dengan surat berkaitan program tersebut yang dimajukan oleh tertuduh pertama kepada migran-migran tersebut, inferens munasabah condong memihak kepada tertuduh pertama bahawa dia tidak boleh dikatakan menyeludup dengan membantu atau memudahkan tujuh migran tersebut keluar dari Malaysia secara haram di bawah s 2 ATIPSOM (lihat perenggan 29–30 & 41–42).

(3) Memandangkan terdapat cap pas khas pada pasport migran kedua hingga keenam dan keterangan dokumentar yang menunjukkan bahawa mereka mempunyai STO (Sistem Temujanji Online) di bawah program tersebut dan mengguna pakai kes *Mohammad Jafor Hossain v Public Prosecutor* [2016] MLJU 1919, mahkamah mendapati bahawa tujuh migran tersebut tidak boleh dikatakan sebagai migran yang diseludup dalam usaha mereka untuk pulang ke tanah air mereka kerana mereka berada di bawah pengecualian program tersebut. PW17 bersetuju bahawa dia mengetahui tentang program tersebut melalui dokumen yang dirampas semasa serbuan namun tiada siasatan lanjut dilakukan untuk mematahkan pembelaan yang dibangkitkan di sini. Oleh itu, kegagalan pihak pendakwaan untuk mematahkan keterangan yang dikemukakan yang memihak kepada tujuh migran tersebut yang berkaitan dengan program tersebut adalah memudaratkan (lihat perenggan 37).

(4) Mahkamah mendapati tiada keterangan dikemukakan di hadapan mahkamah untuk menunjukkan penglibatan tertuduh kedua. Pertama, PW17 menegaskan bahawa tiada seorang pun daripada tujuh migran tersebut mengetahui atau menyebut nama tertuduh kedua atau penglibatannya dalam kes ini, dalam pendedahan mereka. Kedua, tiada

apa-apa dalam keterangan yang menunjukkan tertuduh kedua telah menyediakan cap pas khas palsu atau surat Covid-19 untuk tujuh migran tersebut. PW17 turut mengesahkan fakta ini. Ketiga, tertuduh kedua tidak pernah terlibat atau disebut dalam mana-mana perbualan WhatsApp antara tujuh migran tersebut dan tertuduh pertama. Keempat, tiada dokumen milik mana-mana tujuh migran tersebut ditemui bersama tertuduh kedua. Kelima, tertuduh kedua tidak menyediakan apa-apa tempat perlindungan kepada tujuh migran tersebut dan juga tidak menyediakan pengangkutan ke KLIA2 untuk tujuh migran tersebut. Akhir sekali, tiada keterangan dikemukakan untuk menunjukkan bahawa tertuduh kedua sebenarnya telah membuat pengaturan untuk 'mendirikan' kaunter di KLIA2. Mahkamah mendapati pihak pendakwaan gagal membuktikan tertuduh kedua dan tertuduh pertama telah dalam apa-apa cara berkomunikasi atau merancang atau mengatur atau memudahkan tujuh migran tersebut untuk keluar secara haram. Oleh itu, tertuduh kedua tidak boleh dikatakan mengetahui atau mempunyai sebab untuk mempercayai bahawa pengeluaran tujuh migran tersebut adalah secara haram atau menyalahi undang-undang (lihat perenggan 43–45 & 47).

(5) Sudah menjadi prinsip yang mantap bahawa niat bersama dalam pengertian s 34 Kanun Keseksaan membayangkan rancangan yang telah diatur sebelumnya dan perbuatan jenayah tersebut dilakukan menurut rancangan yang telah diatur sebelumnya. Rancangan tersebut juga boleh berlaku ditempat kejadian semasa melakukan kesalahan tersebut. Bagaimanapun, keadaan kritikalnya ialah rancangan tersebut mesti mendahului perbuatan yang membentuk kesalahan tersebut. Berdasarkan analisis yang dihuraikan di atas, mahkamah mendapati pihak pendakwaan telah gagal membuktikan niat bersama kedua-dua tertuduh dalam dakwaan perbuatan menyeludup tujuh migran tersebut (lihat perenggan 48).

(6) Mahkamah mendapati terdapat jurang yang wujud dalam pembentangan kes pendakwaan secara keseluruhannya. Keraguan munasabah yang wujud gagal dinafikan oleh pihak pendakwaan. Keperluan pembuktian yang ketat dalam kes jenayah tidak boleh dilonggarkan untuk merapatkan apa-apa jurang material dalam keterangan pendakwaan. Berdasarkan keterangan yang dikemukakan, mahkamah tidak yakin dengan kebersalahan kedua-dua tertuduh. Mereka berhak untuk dibebaskan kerana terdapat jurang material yang menimbulkan keraguan munasabah tentang kebersalahan mereka. Memandangkan tanggungjawab membuktikan kebersalahan kedua-dua tertuduh pada sepanjang masa terletak pada pihak pendakwaan, mahkamah mendapati bahawa keseluruhan keterangan menyebabkan mahkamah dalam keadaan ragu-ragu dan oleh itu pihak

pendakwaan gagal untuk memenuhi tanggungjawab pembuktian yang dikenakan kepada mereka (lihat perenggan 49).]

Cases referred to

Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2002] 2 MLRA 383 (refd)

Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805; [2011] 2 AMR 680; [2012] 5 MLRA 377 (refd)

Mohammad Jafor Hossain v PP [2016] MLJU 1919; [2017] 8 CLJ 717 (folld)

Muhammad Hafiz Mukrimin bin Abdulkeh @ Norhisyamuddin lwn Pendakwa Raya dan satu lagi rayuan [2022] 4 MLJ 168; [2022] MLRAU 39 (refd)

Yugarajan a/l Letchimanasamy & Anor v PP [2020] 4 MLJ 796; [2020] MLRAU 136 (refd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 2, 26A, 61A

Evidence Act 1950 s 114(g)

Immigration Act 1959/63 ss 6, 6(1), 6(1)(c), 15(1)(c), 32, 33, 56(2)

Penal Code s 34

Security Offences (Special Measures) Act 2012 s 18A

Nor Amalina bt Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Amirul Ridzuan bin Hanif (with Nur Syafiah Athirah bt Ahmad Syafique and M Izzat Irfan bin Taib) (The Law Office of Amirul & Athirah) for the first accused.

Shalvin a/l Kanvinchelvan (Gabriel Susayan and Partners) for the second accused.

Noorin Badaruddin J:

[1] The accused persons, Jafperi bin Noor ('first accused') and Rohani ('second accused') were charged under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the ATIPSOM') with the following offence:

> Bahawa kamu bersama-sama pada 22 Jun 2021 jam lebih kurang 10.15 malam di sebuah kediaman kuarters penjawat awam yang beralamat di No C-09–07, Jalan Kasturi P17 (Jalan P17), Presint 17, 62100 Putrajaya, di dalam Wilayah Persekutuan di Putrajaya dalam mencapai niat bersama kamu telah menjalankan penyeludupan migran ke atas:
>
> 1. MARIDAR/P/IDN/25.05.1970/NO.PPT: TIADA (AKUAN LISAN) (B1)
> 2. LUKMAN/L/IDN/30.12.1995/NO.PPT: TIADA (AKUAN LISAN) (B2)
> 3. MAHDI/UIDN/20.06/1994/NO.PPT: C1248931 (B3)

4. ZULHADI/L/IDN/11.10.1989/NO.PPT: B8708529 (B4)
5. MUKTARUDDIN/UIDN/02.01.1988/NO.PPT: C3658315 (B5)
6. TEUKUZULFIKAR/L/IDN/18.11.1975/NO.PPT: C4169522 (B6)
7. BULKAINI/L/IDN/27.03.1997/NO.PPT: C3658400 (B7)

yang merupakan warganegara Indonesia. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah s 26A Akta Antipemerdagangan Orang Dan Antipenyeludupan Migran 2007 yang boleh dihukum di bawah Akta yang sama dan dibaca bersama s 34 Kanun Keseksaan.

[2] The migrants stated in the charge will collectively be referred to as 'the seven migrants'.

[3] The prosecution called a total of 20 witnesses to prove a prima facie case against both the accused persons.

[4] In the opening speech, it was the case for the prosecution that both the accused persons in furtherance of their common intention had given shelter to the seven migrants named in the charge at the address stated in the charge for the purpose of their illegal exit from Malaysia via the Kuala Lumpur International Airport 2, Sepang ('KLIA2'). It is the prosecution's case that the seven migrants have committed the offence of staying without valid documentation and had overstayed in Malaysia. The prosecution stated that the seven migrants had obtained assistance from both the accused persons to arrange for their illegal exit from Malaysia to the International Airport Medan-Kualanamu, Indonesia via KLIA2.

NARRATIVE OF PROSECUTION'S CASE

[5] On 22 June 2021, at around 10.15pm based on information received from the public, PW1 and his team headed to and raided an apartment unit the address of which is as stated in the charge ('the premise'). Seven Indonesian nationals were arrested at the premise. PW1 then lodged a police report (P4) and the items seized from the premise are listed in P5 and P10. Meanwhile, P124, P143 and P144 are photographs of the premise and the items seized.

[6] The premise was rented and registered under the first accused's name who was then a civil servant attached at the Economic Planning Unit at the Prime Minister's Department.

[7] The seven migrants were arrested for offences under s 6 (not having a valid pass to enter Malaysia) and s 15 (overstaying in Malaysia) of the Immigration Act 1959/63 (Act 155) (P116 and P155A).

A **[8]** Upon further investigation, the first accused was arrested on 23 June 2021 at around 9.30pm at his family home in Kota Bahru Kelantan by a second raiding team led by PW3. The arrest report was marked as P79 and the items seized from the second arrest location are listed in P80.

B **[9]** On 27 June 2021 at around 9.50pm, PW11 and his team arrested the second accused at Supermarket Pasar Segar Syifa located at 8-G, Jalan LP 7/5, Taman Lestari Perdana, 43300 Seri Kembangan Selangor. The arrest report was marked as P90 and the items seized were listed in P91.

C **[10]** Relying on the depositions taken from the seven migrants under s 61A of the ATIPSOM (P157, P159, P158, P160, P161, P162 and P163), the first accused was identified and confirmed as the person who provided the seven migrants with accommodation at the premise. The first accused was also stated to have had arranged the transportation to and from the KLIA2 and the premise. The first accused was identified by the seven migrants to be the person who facilitated and obtained the special pass for their passports (P156A), purchased and provided them the flight tickets ('P146' and 'P147') as well as obtaining the Covid-19 screening letters under their names (P148).

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E **[11]** The prosecution relied on the statement obtained from the first accused (P145) dated 9 July 2021 where the first accused had identified all the seven migrants and gave his house keys for them to stay. The first accused also confirmed that he knew the second accused whereby the latter had previously helped him to obtain special pass chop for Indonesian nationals. The last dealing the first accused had with the second accused was on 18 June 2021 where the latter had helped him to arrange/facilitate the seven migrants to exit Malaysia through KLIA2.

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G **[12]** The first accused further stated that in order to ensure communication between him and all the seven migrants to exit Malaysia, he had created a Whatsapp group called 'Pulang 18 Jun 2021' for all the seven migrants. In this Whatsapp group, the first accused gave out information and details to the seven migrants to facilitate their exit from Malaysia through KLIA2 and all preparations and arrangements by the first accused accused can be seen from the Whatsapp communication screenshots obtained from all the seven migrants in P122.

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I **[13]** In P154, the second accused stated that on 18 August 2021, in cases where Indonesian wants to return to Indonesia, she would charge the amount of RM100 for getting the special pass chops, Covid-19 screening letters and for the arrangement of setting up with the immigration counters at the airport. The second accused stated that the first accused contacted her to meet up in order to arrange for the exit of Indonesians from Malaysia through the airport.

[14] In her statement, the second accused confirmed that the last dealing she had with the first accused was on 18 June 2021 whereby the first accused seek her assistance to set up the immigration counter at the airport for the Indonesians. However, the arrangement was unsuccessful as there was some delay on that day to which she referred to as 'line tak clear' at the airport. This situation was confirmed by the seven migrants in their depositions where they were told by the first accused that they cannot proceed to the departure hall in KLIA2 as there was an operation/'ops' being carried out and were told that 'line panas' although they have checked-in their luggage for their flights.

[15] According to the prosecution, both the accused persons knew or had reason to believe that the exit of the seven migrants from Malaysia was unlawful and they have provided assistance and services for purposes of arranging, organising and facilitating the exit of the seven migrants whom are said to be smuggled migrants from Malaysia via KLIA2.

THE LAW

[16] At the close of the prosecution case, the court must undertake a maximum evaluation of evidence adduced by the prosecution to determine if the prosecution has proven a prima facie case against the accused. If a reasonable doubt is created, it would mean that the prosecution has failed to prove a prima facie case. See *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2002] 2 MLRA 383 and *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805; [2011] 2 AMR 680; [2012] 5 MLRA 377.

[17] S 26A of the ATIPSOM states that any person who carries out smuggling of migrants commits an offence.

[18] The expression 'smuggling of migrants' is defined in s 2. It includes:

(a) arranging, facilitating or organising, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful; and

(b) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in para (a).

[19] A smuggled immigrant is defined in s 2 as a person who is the object of the act of smuggling of migrants, regardless of whether that person participated in the act of smuggling of migrants.

[20] To establish the charge against the accused persons, it is thus incumbent on the prosecution to prove:

(a) that the seven migrants were smuggled migrants; and

(b) that the accused persons in furtherance of their common intention had assisted in the smuggling of the seven migrants out of Malaysia.

ANALYSIS AND FINDINGS

[21] In arguing that the evidence in their favour is sufficiently strong, prosecution relied heavily on the seven depositions of the seven migrants wherein they have stated that they wanted to return to Indonesia and admitted that they have no valid permit to remain as well as had overstayed in Malaysia. According to the seven migrants, they knew the first accused because it was the first accused who had informed them that he could make the necessary arrangements such as providing them with a temporary accommodation in Putrajaya and obtain the special pass chop for their passports, Covid-19 screening letters and flight tickets to Indonesia. The seven migrants admitted that they did not go to any clinic for Covid-19 screening nor to any immigration office to obtain special passes chop in their passports. According to the seven migrants, they had given their passports to the first accused for purposes of facilitating their departure from Malaysia.

[22] It is submitted that the evidence via the seven migrants' depositions were supported by documentary evidence and the Whatsapp conversations screenshots between the seven migrants and the first accused. It is highlighted to the court that upon investigation, it was found that the special pass chop in the seven migrants' passports were irregular/forged ('P156A') and the Covid-19 screening letter was never issued under the names of the seven migrants.

[23] The prosecution relied heavily too on the statement given by both the accused persons (P145 and P154) which is said to have supported the evidence of the seven migrants in their respective depositions. P145 and P154 were admitted as evidence pursuant to s 18A of the Security Offences (Special Measures) Act 2012 ('the SOSMA'). It was highlighted that the mobile number 011–10656446 was registered under the first accused's name and was used by him which is consistent with the depositions and the Whatsapp screenshots obtained from the seven migrants.

[24] It is further argued that the prosecution did not have to prove the act of smuggling by both the accused persons as provided in s 26A and s 2 of the ATIPSOM as the act of arranging, organising or facilitating directly or indirectly is sufficient to prove the act of smuggling of migrants.

[25] Although P145 and P154 were admitted as evidence under s 18A of the SOSMA, both statements must not be evaluated in isolation but instead it must be evaluated together with the other evidence adduced ie whether the evidence adduced supports the statement made by both the accused persons.

[26] Based on their plea of guilty for the offences under s 6(1)(c) and s 15(1)(c) of Act 155, the prosecution contended that the seven migrants have entered and remained in Malaysia without a valid pass and as such pursuant to s 61A of the ATIPSOM, their depositions were taken before the magistrate. The prosecution further adduced the 'Perintah Tahan Usir' ('PTU') attached together with the seven migrants' depositions as provided under ss 32, 33 and 56(2) Act 155 and as such the preconditions of the admissibility of the depositions have been satisfied. Premised on the seven migrants' depositions the prosecution then argued that in their attempt to exit Malaysia illegally, all the seven migrants are smuggled migrants as defined under s 2 of the ATIPSOM.

[27] On the other hand, it is the defence's case and the question that arose was whether the seven migrants are smuggled migrants when at the time they were in the process of exiting Malaysia, the Malaysian government had initiated a programme known as 'Program Rekalibrasi Pulang' ('the programme'). It is not disputed that the programme was launched and executed on 16 November 2020 to 30 June 2020 in West Malaysia. PW17, the investigating officer, testified that in this programme, migrants who have been charged for offences for not having a valid pass and overstayed in Malaysia were qualified to participate. D165 is a chart issued by the immigration department via their website which underlined or displayed how the programme worked where the migrants could just walk-in to the special counter meant for the programme to participate and PW17 affirmed that no registration was required.

[28] PW17 affirmed that at the material time all the seven migrants were eligible to participate in the programme and the programme was in progress. The evidence of PW17 in cross-examination are as follows:

> Soalan: Saya katakan dalam tempoh tersebut iaitu 16 November 2020 sehinggalah 30 Jun 2022 saya kata kan Jabatan Imigresen Malaysia telah menganjurkan satu program yang dinamakan Program Rekalibrasi Pulang khas untuk PATI?
>
> SP17: Setuju
>
> Soalan: Maka, jika kita rujuk silang 16 November 2020 sehingga 30 Jun 2022, dengan pertuduhan kes kita iaitu pada 22 Jun 2021, saya kata kan sewaktu migran-migran ditangkap, anakguam saya ditangkap, OKT2 ditangkap, mereka ditangkap dalam lingkungan tarikh program rekalibrasi tersebut?
>
> SP17: Setuju

Soalan: Warga asing yang layak menyertai program rekalibrasi tersebut adalah samada, yang melakukan kesalahan s 6(1)(c) Akta Imigresen 1963 atau s 15(1)(c) Akta Imigresen 1963 atau Peraturan 39(b) Peraturan-Peraturan Imigresen 1963 dalam bahasa mudah tinggal di Malaysia tanpa pas dan permit yang sah samada tinggal lebih masa atau langgar syarat Pas, PATI-PATI ini boleh menyertai program Rekalibrasi pulang tersebut setuju puan?

SP17: Setuju Yang Arif

Soalan: Tengok D165 kita pergi ke helaian kedua di bahagian carta, setuju dengan saya kalau kita tengok carta, carta ini menggariskan/memaparkan perjalanan program rekalibrasi pulang ini dalam bentuk interaktif yang semua orang faham?

SP17: Setuju

Soalan: Jadi kalau kita rujuk carta di bahagian kiri mukasurat helaian itu, adalah perkataan mula dan ada arrow ke bawah kemudian saya kata kan tertulis hadir secara walk in ke kaunter khas program rekalibrasi pulang KLIA1/2, Stulang Laut, Pasir Gudang, setuju?

SP17: Setuju Yang Arif

Soalan: Berdasarkan keterangan yang diberikan oleh Jabatan Imigresen Malaysia di dalam D165 ini, saya kata kan PATI yang ingin menyertai ataupun migran yang ingin menyertai program Rekalibrasi pulang ini, dia hanya perlu walk in tak perlu mendaftar?

SP17: Setuju

Soalan: Kita rujuk silang keadaan ini dengan keadaan migran-migran dalam kes kita yang dikata kan individu-individu seramai 7 orang itu, yang dikatakan migran melibatkan OKT1 ini, saya katakan mereka juga di dalam tempoh rekalibrasi pulang ini mereka juga boleh walk ini ke kaunter KLIA nak sertai program rekalibrasi pulang setuju puan?

SP17: Setuju

Soalan: Di saat mereka ditangkap, saya kata kan mereka masih lagi berada di lingkungan ataupun kecualian yang diberikan oleh Kerajaan Malaysia melalui Jabatan Imigresen Malaysia, iaitu berada di dalam program Rekalibrasi Pulang setuju?

SP17: Setuju

Soalan: Rujuk P159 gambar no 13. P159 adalah deposisi Bulkaini. Setuju dengan saya dalam gambar no 13 tersebut, saya katakan ada surat tentang program rekalibrasi telah diforward atau pun dimajukan oleh Bg Jefri kepada Bulkaini, setuju?

SP17: Setuju

Soalan: Sekiranya migran-migran terfikir nak join program ini, bercadang nak join, ataupun ingin join, sedang ingin join, maksudnya belum nak join tapi terfikir nak join, mereka semua itu termasuk dalam kecualian yang telah digariskan dan

dibenarkan oleh Kerajaan Malaysia, Kementerian Dalam Negeri dan juga Jabatan Imigresen Malaysia, setuju?

SP17: Setuju.

[29] Pertinently, in the screenshots of the Whatsapp communication between one of the seven migrants (Bulkaini) (P159 picture No 13) with the first accused, there was a letter relating to the programme forwarded to Bulkaini by the first accused. Reasonable doubt arises herein. The question is, whether the first accused for that matter was facilitating the exit of the seven migrants from Malaysia illegally when there was a letter relating to the programme which legitimise the return of all illegal immigrants or known as PATI, forwarded by the first accused to one of the seven migrants (Bulkaini). This letter somehow was not extracted and produced by the prosecution and what the first accused had to say or had said regarding this letter was not extracted by PW17, the investigating officer. The reasonable doubt is further compounded by the fact that even in the first accused's statement, he had stated that his purpose of creating the Whatsapp group was to inform migrants who contacted him, any information regarding the programme as well as informing them the vacancies of the STO (Sistem Temujanji Online) in any of the immigration office. In fact, upon perusing the voluminous extracts of the Whatsapp communications of the seven migrants, it is apparent that there were discussions between them regarding the programme. In other words, it can safely be inferred that the seven migrants did intend to participate in the programme with the assistance of the first accused.

[30] No evidence was adduced by the prosecution to show that the seven migrants were not entitled to the protection or exception under the programme. PW17 admitted that it was not within her jurisdiction or she did not have knowledge whether the seven migrants were registered under the programme and this court is of the view that the evidence from the relevant division relating to the programme ought to have been called to testify and verify as to the seven migrants exit from Malaysia. As such, with the evidence from PW17 as stated in the above and the Whatsapp conversations of the seven migrants coupled with the letter relating to the programme forwarded by the first accused, reasonable inference tilt in favour of the first accused in that he cannot be gainsaid to be smuggling by assisting or facilitating the seven migrants' exit from Malaysia illegally under s 2 of the ATIPSOM.

[31] This court further finds that the status of the seven migrants either as illegal migrants/without legal pass or who had overstayed in Malaysia are also doubtful although they have pleaded guilty to the offences. In regards to the migrant Maridar (B1) named in the charge, there was an audio recording of his voice (affirmed by PW17 as Maridar's voice) whereby Maridar did mentioned that he had given his passport to the Grab driver who drove them to the airport

(PW7) (audio recording P112(A)). The passport belonging to Maridar was never confiscated. PW17 only relied on the fact that there were no movement records of Maridar and as such he was taken as an illegal migrant.

[32] The same case happened in regards to the migrant named Lukman (B2) in the charge. PW17 relied only on the movement record (P116(7)) which shows no record of Lukman's movement. However, in reference to Lukman's deposition and the Whatsapp conversation screenshot prepared by PW17 herself, PW17 admitted that there was Lukman's passport with a special chop sent by Lukman to 'TGK Basri'. PW17 further agreed that Lukman's passport was also given to SP7. Nevertheless, despite the fact that the passports belonging to both Maridar and Lukman exist, their passports were never confiscated and their passports numbers were never recorded or noted to verify whether both Maridar and Lukman possessed valid travelling documentations.

[33] It must be highlighted that the prosecution's contention that the special chop in the passports is fake or forged was never proven. All PW17 had to say was that the chop was 'tidak teratur'. In fact, where the other migrants are concerned ie Zulhadi, Bulkaini, Mahdi, Muktaruddin and Teuku Zulfikar, the copy of their passports have the special chops which were still valid at the time they were arrested.

[34] The prosecution relied on a memo from the investigation, operation and prosecution division to say that the special chops were forged but PW17 testified that in regards to the special pass chop, it is for someone from the division which handled the programme that could verify them. PW17 further admitted that the fact the special pass chops are irregular or 'tidak teratur' does not mean the special passes were forged. It must also be borne in mind that none of the seven migrants were charged for forging the 'endorsement' of the special pass chops on their passports. The seven migrants must be given the benefit of the doubt. If the seven migrants have valid special pass chops which can only be verified by someone from the division which handled the programme and they were applying to participate in the programme, can they still be considered as smuggled migrants under the law when they seek assistance from the first accused to exit Malaysia through a valid channel?

[35] PW17 for that matter agreed that at the time the seven migrants were at KLIA2 to return home, they were having possession of flight tickets bought by the first accused earlier and PW17 further admitted that by having a flight tickets which were purchased earlier, the seven migrants have fulfilled the conditions of the programme to be returned to their country. PW17 testified that since there was no necessity for the seven migrants to register to participate in the programme and all the seven migrants had to have were their passports and flight tickets to return to their homeland, they came under the 'exception'

of the programme. PW17 testified as follows:

Soalan: Dan jika saya katakan kepada Puan, warga-warga asing yang layak menyertai program rekalibrasi pulang tersebut adalah sama ada yang melakukan kesalahan s 6(1)(c) Akta Imigresen 1963 atau s 15(1)(c) Akta Imigresen 1963 atau Peraturan 39(b) Peraturan-Peraturan Imigresen 1963, dalam bahasa mudah nak bagi semua orang faham, tinggal Malaysia tanpa pas dan permit yang sah, sama ada tinggal lebih masa atau melanggar syarat pas. PATI-PATI ini boleh menyertai Program Rekalibrasi Pulang ini. Setuju puan?

...

SP17: Setuju Yang Arif

Soalan: Dan mereka telah hadir ke KLIA atau ke lapangan terbang tersebut pada Ketika itu dengan tiket yang tidak dipertikaikan dibeli oleh OKT1, setuju?

SP 17: Setuju Yang Arif

Soalan: Dan kalau puan setuju dengan soalan saya, saya kata kan tiket yang dibeli oleh OKT1 merupakan tiket yang dibeli lebih awal menepati syart-syarat yang telah digariskan di halaman kedua di bahagian II, di bahagian catatan II (P165), setuju

SP 17: Setuju Yang Arif

Soalan: Maka pada ketika itu, akibat puan telah bersetuju dengan soalan saya, maka pada ketika itu, imigran-imigran ini tertakluk pada bawah satu 'exception' ataupun pengecualian dari segi program rekalibrasi pulang ini, sebab mereka tidak perlu mendaftar. mereka hanya perlu hadir, bawa passport, bawa tiket yang kami tidak pertikaikan dibeli oleh OKT1, maka mereka tertakluk di bawah pengecualian ini. Setuju puan?

SP17: Setuju Yang Arif

Soalan: Tetapi faktanya, malangnya puan, mereka ini tidak dapat terbang pada hari itu, betul Puan?

SP 17: Setuju Yang Arif

Soalan: Mereka Kembali ke rumah, tempat kejadian dan ditangkap di situ, setuju puan?

SP 17: Setuju Yang Arif

Soalan: Di saat mereka ditangkap, saya kata kan mereka masih lagi berada di dalam lingkungan ataupun pengecualian oleh Kerajaan Malaysia melalui Jabatan Imigresen Malaysia, iaitu berada dalam program rekalibrasi pulang, setuju?

SP17: Setuju

[36] In the case of *Mohammad Jafor Hossain v Public Prosecutor* [2016] MLJU 1919; [2017] 8 CLJ 717, the applicant filed a revision to the High Court relating to his conviction for not having a valid pass, an offence under s 6(1) of Act 155. The facts revealed that at the material time, the applicant had registered with the MyEG programme, a programme for hiring and relocation

of illegal immigrants (PATI) introduced by the government of Malaysia to enable the PATI to continue working with their employer and by granting them with a temporary visiting pass. Ghazali Cha J (as he then was) held:

> (1) Walaupun tidak lagi memiliki permit pekerjaan yang sah, akan tetapi, selepas didaftarkan dengan MyEG, maka status pemohon sebagai PATI di negara ini telah berubah kepada PATI yang dibenarkan untuk tinggal di negara ini sehingga proses pendaftaran oleh MyEG selesai. Dalam erti kata lain, setelah mendaftarkan dirinya dan membayar RM1134.52 kepada MyEG untuk program 'rehiring' tersebut, pemohon bukan lagi seorang PATI.
>
> (2) Pihak imigresen tidak boleh menuduh dan mendakwa pemohon selepas dia mengikuti program 'rehiring' ini. Jika tidak, pihak Kerajaan boleh dipertanggungjawabkan sebagai menipu PATI kerana masih menangkap dan menuduh mereka di mahkamah walaupun setelah mereka mendaftar diri dengan program dan membuat bayaran-bayaran tertentu.

[37] According to D165, there was no necessity for the seven migrants to register. In view of the fact that there were special pass chops on B2-B6 passports and documentary evidence to show that they had the STOs under the programme and applying the case of *Mohammad Jafor Hossain*, this court finds that the seven migrants cannot be gainsaid to be smuggled migrants in their effort to return to their homeland as they came under the exception of the programme. PW17 agreed that she knew of the programme through the documents seized during the raid and yet no further investigation was done to rebut the defence raised herein. The failure on the part of the prosecution to rebut the evidence adduced in favour of the seven migrants relating to the programme is therefore fatal.

[38] The first accused was also alleged to have prepared or obtained the Covid-19 letter for all the seven migrants from the company known as Gribbles. But nowhere in the evidence that disclosed or proved this allegation. Firstly, the first accused was never caught having possession of the Covid-19 letters from Gribbles. Nowhere in the Whatsapp conversations disclosed that the first accused had given the same letter to any of the seven migrants. PW17 for that matter admitted that even she did not know any connection between the first accused and the Covid-19 letters from Gribbles. The fact proven is that the Covid-19 letters do not belong to any of the seven migrants and no evidence was adduced to show that the first accused went to Gribbles to get the Covid-19 letters for the seven migrants.

[39] This court further finds that there was no evidence to show that it was the first accused who had prepared the 'Surat Perjalanan Laksana Passport' ('SPLP') or the special pass chops found in the passports belonging to the seven migrants. In fact, from the screenshots of the Whatsapp conversations from the four depositions out of the seven migrants (P158, P159, P160 and P163), it is

apparent that they were the ones who had sent their passports photographs with the special pass chops, their SPLP photographs, the STO letters with particulars under the programme, to the first accused. The screenshots of the Whatsapp conversations and the documents attached therein negate the four migrants allegations in their depositions that it was the first accused who had prepared the documents for them or the other three migrants.

[40] The only evidence available is the fact that it was the first accused who had bought the flight tickets earlier for the seven migrants. This piece of evidence and admission by the first accused cannot be said to be proof that the first accused was facilitating the exit of the seven migrants illegally or that the first accused knew or had reason to believe that he was facilitating their exit illegally as it is clear from the situation as disclosed in the evidence, the seven migrants are confirmed to have come under the exception of the programme and having a return flight ticket is one of the conditions to return home under the programme.

[41] In one of the screenshots (P122, E157 picture No 29) of the seven migrants for that matter, there was an exit memo wherein the purpose is stated to be 'Program Rekalibrasi Pulang'. Again, this memo was never extracted by PW17. It must be stated and observed that documents relating to the programme found in the seven migrants' handphone which could be in favour of the defence was never extracted during the investigation. This court finds that the investigation conducted by PW17 was not objective in nature. It was one-sided and the evidence which was favorable to the first accused was somehow 'ignored'. PW17's omission had compromised the defence's case and that has created doubts in the prosecution's case. There were gaps that exist in the unfolding of the prosecution's case in its entirety and doubts which exist and not negated by the prosecution calls for the invocation of s 114(g) of the Evidence Act 1950 in that evidence which could be and is not produced would if produced be unfavorable to the prosecution.

[42] Since the programme is a programme allowing the seven migrants to return to their country legally, and there was evidence to show that the first accused did forward the letter relating to the same, this court finds that the first accused has not committed any act of smuggling as defined under s 2 of the ATIPSOM by using any illegal or unlawful means to facilitate the departure of the seven migrants.

[43] In regards to the second accused, the only evidence that the prosecution relied on is the statement by the first accused that he had seek assistance from the second accused relating to the seven migrants' return to their country. It was said that the second accused was responsible in 'setting-up' the immigration counter at KLIA2. However, this court finds that nowhere in the evidence

adduced before the court to show the involvement of the second accused herein.

[44] Firstly, PW17 affirmed that none of the seven migrants knew or mentioned the name of the second accused or her involvement in the present case, in their depositions. Secondly, nowhere in the evidence that shows the second accused had prepared forged special pass chops or the Covid-19 letter for the seven migrants. PW17 affirmed this fact too. Thirdly, the second accused was never involved or mentioned in any of the Whatsapp conversations between the seven migrants and the first accused. Fourthly, no documents belonging to any of the seven migrants were found with the second accused. Fifthly, the second accused did not provide any shelter to the seven migrants and neither did she provided transportation to KLIA2 for the seven migrants.

[45] No evidence was adduced to show that the second accused had in fact made arrangement for 'setting-up' the counter at the KLIA2. Instead, according to the depositions of Maridar (P157) and Zulhadi (P158) they were dealing with PW8 who was a police personnel at the KLIA2. PW8 never identified the second accused in court as the person who was involved in the 'setting-up' of the immigration counter at the KLIA2. No evidence was adduced to show that the second accused was at the KLIA2 immigration counter to facilitate the exit of the seven migrants. Pertinently, no evidence was adduced to show any communication between the first accused and the second accused relating to the seven migrants' exit or whatsoever.

[46] No investigation was carried out by PW17 to disprove the defence's version of fact. This court finds that the manner in which PW17 had conducted her investigation left many stones unturned and material gap exists (see: *Muhammad Hafiz Mukrimin bin Abdulkeh @ Norhisyamuddin lwn Pendakwa Raya dan satu lagi rayuan* [2022] 4 MLJ 168; [2022] MLRAU 39).

[47] This court finds that the prosecution has failed to prove that the second accused and the first accused had in any way communicated or planned or arranged or facilitated the exit of the seven migrants illegally. Therefore, it is the finding of this court that the second accused cannot be said to have known or had reason to believe that the seven migrants' exit was illegal or unlawful.

[48] It is well-settled principle that common intention within the meaning of s 34 of the Penal Code implied pre-arranged plan and the criminal act was done in pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence. However, the critical circumstance is that the said plan must precede the act of constituting the offence (see: *Yugarajan a/l Letchimanasamy & Anor v Public Prosecutor*

[2020] 4 MLJ 796; [2020] MLRAU 136). Based on the analysis elaborated in the above, this court finds the prosecution has failed to prove common intention of both accused persons in the alleged act of smuggling the seven migrants.

[49] It is the finding of this court that there were gaps that exist in the unfolding of the prosecution's case in its entirety. Reasonable doubts which exist are not negated by the prosecution. The requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Premised on the evidence adduced, this court is not convinced of the guilt of both accused persons. They are entitled to an acquittal as there are material gaps which raised reasonable doubts as to their guilt. As the onus of proving the guilt of both the accused persons lies throughout on the prosecution, this court finds that the whole evidence left this court in real state of doubt and as such the prosecution has failed to satisfy the onus of proof which lies upon them.

CONCLUSION

[50] Premised on the above analysis and findings, the accused persons were discharged and acquitted without them having to enter their defence.

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Reported by Dzulqarnain Ab Fatar